



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 100 OF 2015**

*(Being an Appeal from Engineer SRMCC No. 75 of 2015)*

**ROSEMARY NYAMBURA MBURU.....APPELLANT**

**-VERSUS-**

**LILIAN WAITHERA MBURU.....1<sup>ST</sup> RESPONDENT**

**DORCAS WANJIKU MBURU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The background to the Notice of Motion filed on 19<sup>th</sup> May, 2016 is that the Applicant sued the Respondents before the Senior Resident Magistrate's Court Engineer seeking the following order in her amended plaint:-

**“a) An order that the Plaintiff be allowed and or be included in the burial participation of the Deceased and be allowed to be part of the burial program as the 4<sup>th</sup> wife of the Deceased until the burial rites are fully concluded.**

**b) This Honourable court do grant temporary orders of injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from either by themselves, their servants, agents or any other person working on their behest from conducting burial arrangement of the Deceased Paul Mburu Karanja or organizing, arranging, preparing the interment of the Deceased body or removal of the remains of the Deceased Paul Mburu Karanja from Kenyatta University mortuary, or burying the remains of the Deceased in Land Parcel NYANDARUA/MURUAKI/228 or any other place until this case is heard and determined or until further orders of the court.**

**c) General damages.**

**d) Costs of suit and interest thereof at court rates.**

**e) Any other relief that this Honourable court may deem fit and just to grant.” (sic)**

2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were sued in their capacity as the 2<sup>nd</sup> and 3<sup>rd</sup> wives of **Paul Mburu Karanja** deceased, whom the Applicant also averred to be her husband. The grievance for which the Applicant sought remedy was that as the 4<sup>th</sup> wife of the deceased, she had been excluded from participating in his burial arrangements.

3. Following a full hearing, the Applicant's suit was dismissed with costs, which were subsequently

“taxed” or assessed at Shs 82,285/=. A decree issued on 11<sup>th</sup> November, 2015. Aggrieved by the decision of the lower court the Applicant filed an appeal before this court.

4. The instant application is expressed to be brought primarily under Order 42 Rule 6 of the Civil Procedure Rules. Some of the grounds on the face of the Notice of Motion are:-

“a) .....

b) .....

**c) THAT the Respondents have now taxed the bill of costs before the Subordinate Court being the purported party and party costs hence they can execute any time.**

**d) THAT the Subordinate Court has now dismissed the application for stay of execution hence the Respondent can execute for costs anytime.**

**e) THAT if execution is carried out, the Appellant is likely to suffer substantial if not irreparable damage.**

f) .....

5. The Applicant, through her affidavits and arguments contends that she is entitled to apply to this court for stay of execution, notwithstanding the dismissal of the initial application for stay of execution in the lower court. That she has appealed against the finding of fact by the lower court to the effect that she was not the 4<sup>th</sup> wife of the deceased, notwithstanding the fact that the burial dispute has determined. Her further contention is that she stands to suffer substantial loss in two respects.

6. In the first place, she says she has no means to pay for the suit costs as she was dependant on the deceased for her up keep; and secondly, that she stands to be excluded, by virtue of the lower court’s impugned finding, from participating in succession proceedings in respect of the deceased’s estate. That she is willing to give some form of security even though the estate of the deceased is itself a form of security. Additionally, she contends that the Respondents have not demonstrated capacity to restitute any payments should the appeal succeed.

7. The application was opposed through a Replying affidavit sworn by the 1<sup>st</sup> Respondent. The position taken by the Respondents through affidavit evidence and oral arguments is two pronged. First, a technical objection is raised regarding the Notice of Motion for the reason that no appeal has been filed in respect of the lower court decision dismissing a similar motion.

8. Another objection raised is that no stay order can issue as “there is no judgment and decree being executed.” Related to this objection is the contention that Applicant’s prayers in the suit in the lower court did not contain a declaratory prayer in respect of her status as a wife of the deceased.

9. On the merit of the application, the Respondents contend that there has been delay on the part of the Applicant and that the present application is merely intended to delay payment of costs. Further, that the subject matter no longer exists as the burial has already taken place. The Respondents demanded that if the application is allowed, security must be given asserting that the Applicant has not shown that the Respondents are incapable of restitution.

10. In her response, the Applicant argued that the prayer in the Notice of Motion was for stay of execution of the judgment and decree including costs. That the Applicant having unsuccessfully moved the lower court for stay properly approached this court, albeit the process was held up by the delayed supply of proceedings of the lower court. On the amended plaint in the lower court, the Applicant stated that even though the same did not contain a declaratory prayer, the status of the Applicant vis-à-vis the deceased was an issue in the trial, and was determined.

11. I have considered the affidavit evidence and arguments made by the parties' respective counsel. There is no dispute that the amended plaint (annexture **LWM4** to Replying affidavit) at paragraph 5 and 6 contains averments that the Applicant was the 4<sup>th</sup> wife to the deceased. Indeed the entire claim in the plaint is premised on the alleged status of the Applicant as a wife to the deceased. It is also true that the said plaint did not contain any declaratory prayer in that regard, but that the issue of her status necessarily had to be determined at the trial.

12. The trial court found that the Applicant was not a wife to the deceased and dismissed her suit. Several consequences naturally flowed from that decision. The Applicant was ordered to pay costs. Secondly, as the Respondents have deponed, the burial of the deceased in which the Applicant sought to participate, was carried out. This happened because that Applicant's application for stay of execution pending appeal was denied in the lower court.

13. Three related questions *a priori* require determination before considering the actual merits of the application. These are:-

a). Is the Applicant entitled to apply to this court subsequent to the dismissal of a similar motion in the lower court?

b). Is the judgment of the lower court capable of execution?

c). Has the judgment been fully executed so that there is nothing left for staying?

14. Concerning the first question, I think that a ready answer is provided by Order 42 Rule 6 (1) of the Civil Procedure Rules which states:

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”**

15. The Court of Appeal, has delivered itself on the application of Order 42 Rule 6 (1) of the Civil Procedure Rules in both original and appellate jurisdictions in several decisions, while considering its own Rule 5(2) b which is essentially at *pari materia* with order 42 Rule 6 (1) of the Civil Procedure Rules.

16. In **Equity Bank Ltd –Vs- West Link MBO Ltd Githinji J A** had this to say in his judgment:

**“[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838.**

17. A plain reading of Order 42 Rule 6 (1) of the Civil Procedure Rules leaves no doubt that this court has jurisdiction to consider a fresh application for stay of execution pending appeal, even where, a similar application was refused in the lower court. The Applicant need not be appealing from the ruling in the lower court on the dismissed application.

18. So long as an appeal from the substantive decision of the lower court has been lodged an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained a fresh in the High Court. I

believe that was part of the distinction that the Court of Appeal was making in the **Githunguri Case** concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now).

19. In that case, the Court considered the awkwardness that would result from an insistence that there be an existing appeal on the ruling of the lower court rejecting an application for stay pending appeal, in and particular requiring that first, the order of the lower court be set aside after the hearing of the appeal. And only then a fresh application for stay pending appeal to be made. I have no difficulty in finding that the Applicant is entitled to bring the present application before the High Court even though a similar application was rejected by the lower court.

20. On the second question, the answer is in the affirmative and is provided by the Respondent's assertion that, following the dismissal of the suit in the lower court, the Respondents proceeded (I presume to the exclusion of the Applicant) to bury the deceased. No doubt, in the manner, date and place of their desire, which is what the Applicant had resisted by filing the suit. Evidently, a stay had held their hand during the pendency of the suit in the lower court.

21. Secondly, the Respondents have extracted a decree and have evinced every intention to execute for recovery of costs, hence the present application. Thirdly, and this appears to be the Applicant's substantive fear, the Respondents are entitled by virtue of the judgment to go ahead and file for letters of administration in respect of the estate of the deceased, without seeking the consent of the Applicant. This outcome too can be said to flow as a direct consequence of the lower court's judgment, and in particular, the finding that the Applicant was not a spouse of the deceased.

22. Regarding the 3<sup>rd</sup> question, it is my view that to the extent that the deceased was buried by the Respondents (seemingly without the Applicant's participation), the lower court judgment has been partially executed. The execution in respect of costs and possibly the future application for letter of administration are on course. Thus, it cannot be said that there is nothing to stay or that no substratum remains for preservation.

23. Turning to the application itself, I note that the lower court delivered judgment in September, 2015. The memorandum of appeal was filed on 23<sup>rd</sup> October, 2015. The decree was extracted in December 2015 but it was not until mid-May 2016 that the present application was filed. It is noteworthy however that the Respondents' replying affidavit asserts that the application for stay pending appeal was dismissed in the lower court on 17<sup>th</sup> May, 2016. There is therefore no substance in the Respondent's assertion that the Applicant is guilty of laches.

24. The cornerstone of an application for stay pending appeal is substantial loss. As stated by **Platt Ag. J A** stated in **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR:-**

**“...the test would be whether the appeal would be rendered nugatory, unless payment of the decretal were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be rendered nugatory.....no reasons given why the appeal will be rendered nugatory. The court inquired into the Respondent's circumstances but the information that was forthcoming did not confirm the applicant's misgivings.**

**It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”**

25. Granted the decree herein was only partly monetary. One aspect of substantial loss cited by the Applicant is that she is unable to pay the assessed costs, having been dependant on the deceased, and

secondly, that she will be unable to recover costs paid to the Respondent should her appeal be successful. I am not quite convinced that the costs in question involve amounts that parties who obviously have capacity to instruct counsel in this case would be unable to pay; presently by the Applicant, and later upon the appeal terminating in the Applicant's favour, by the Respondents.

26. It is the second aspect of substantial loss that has caused me some concern, arising from the nature of the proceedings in the lower court. The Applicant was essentially laying a stake in the affairs of the deceased by asserting her alleged status as a spouse. It is true, that as a consequence of the dismissal of the suit, the deceased was buried without the participation desired by the Applicant. Nothing can change that, not even her success on appeal.

27. That notwithstanding, the determination that the Applicant was not a wife of the deceased also affects any future involvement by her in the administration of the estate of the deceased. There can be no denying that if the Respondents finalise the anticipated succession proceedings to the inclusion of the Applicant, she would suffer substantial loss that is incomparable to the question of costs.

28. Such substantial loss is partly what she is trying to forestall by her present application. The fact that the issue of the Applicant's relationship with the deceased has been determined by the lower court also means that it cannot be revisited in succession proceedings in the lower court, as provided under the Law of Succession Act. Thus, it is an inescapable fact that the outcome of the appeal before this court might have some impact on the future administration of the estate of the deceased.

29. In the circumstances, and in the interest of justice, balancing one thing against another, I am inclined to make the following orders:-

- a). I allow the prayer for stay of execution of the judgment and decree of the lower court pending appeal, but on condition that within 7 days the Applicant deposits the sum of Shs. 40,000/= as security for payment of decreed costs, in the event that the appeal is unsuccessful.
- b). For the avoidance of doubt, and for the sake of good order, bearing in mind the peculiarities of the present matter, the stay order issued herein will serve to stay any existing or contemplated succession proceedings in respect of the estate of the deceased by the Respondents or their agents, in furtherance of the impugned judgment and decree of the lower court.
- c). In order to expedite these proceedings, the applicant is directed to file her record of appeal within 30 days of today's date.
- d). Each party will bear own costs.

Delivered and signed at Naivasha on this **22<sup>nd</sup>** day of **July, 2016**.

In the presence of:-

For the Appellant : N/A

For the Respondents : Mr. Mburu

Court Clerk : Lillian

**C. MEOLI**

**JUDGE**